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September 22, 2003

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VIA HAND DELIVERY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Wireline Competition Bureau
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SEP 22 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: In the Matter of Vonage Holdings Corporation's Petition for Declaratory Ruling

Dear Ms. Dortch:

On behalf of Vonage Holdings Corporation ("Vonage"), enclosed please find an original and four (4) copies of Vonage's Petition for Declaratory Ruling filed pursuant to Section 1.2 of the Commission's rules.

**Please date-stamp the enclosed extra copy of this filing and return it in the envelope provided.
Please do not hesitate to contact us if you have any questions regarding this filing.**

Respectfully submitted,

W.B. Wilhelm

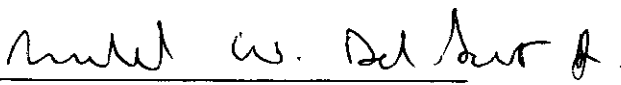
William B. Wilhelm
Russell M. Blau
Tamar Finn

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of September 2003, a copy of Vonage Holdings Corporation's Petition for Declaratory Ruling was sent via postage prepaid, first-class mail to the individuals on the attached list.



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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
VONAGE HOLDINGS)
CORPORATION)
Petition for Declaratory Ruling)
Concerning an Order of the Minnesota)
Public Utilities Commission)

PETITION FOR DECLARATORY RULING

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SUMMARY

Vonage offers a Voice over Internet Protocol service that permits communication between users of broadband Internet connections. The service also permits broadband Internet users to communicate with users of conventional telephone services. Unlike some other VoIP services, Vonage does not use "dial-up" access. All of its customers must provide their own computer equipment and all Vonage customers must utilize their own dedicated broadband connection to the Internet. Vonage performs a net protocol conversion service that "bridges" the incompatible formats of the Internet and the Public Switched Telephone Network. Thus, under the Commission's *Computer II* decision and two decades of precedent interpreting that decision, Vonage offers an information service and is not subject to common carrier regulation under Title II of the Act.

The State of Minnesota is now seeking to impose common carrier regulation on the "intrastate" use of Vonage's Internet application, on the theory that this service is "functionally the same as" a telephone service. If the State is permitted to enforce its order, Vonage -- and presumably other providers of two-way Internet communications applications available to residents of Minnesota -- would be required to obtain state certification before allowing Internet users physically located in Minnesota (assuming it could identify them) to use such services to communicate with other Minnesotans. Because Internet applications like Vonage's service were designed to be provided ubiquitously over the Internet, neither Vonage nor other developers of similar Internet communications technologies can reasonably be expected to ever obtain a telecommunications carrier certification. Internet communications applications were never designed to comply with the legal and technical requirements applicable to fixed, switched telecommunications networks, let alone be saddled with obligations such as State tariff rules, rate regulation, and other forms of regulation typically imposed on common carriers.

Minnesota's regulation conflicts with this Commission's long-standing policy of deregulating information services, based on specific findings that common carrier-type regulation of

these services is both unnecessary and contrary to the public interest. Further, Minnesota's effort to regulate an individual application offered over a broadband Internet access connection is contrary to the Commission's findings in both its *Universal Service Report to Congress* and its *Cable Modem Declaratory Ruling* that Internet access itself is an information service that encompasses all manner of applications (including some with telecommunications characteristics) offered over the worldwide interconnected network of computers. Therefore, Vonage requests that the Commission preempt Minnesota's imposition of entry and rate regulation on Vonage's service.

Further, Minnesota has ordered Vonage to comply with the same rules as local exchange carriers with respect to 911 services. Although Vonage does offer a 911 dialing service to its users and is committed to improving this service to enhance customer safety, the nature of Vonage's service makes full compliance with Minnesota's expectations impossible. Vonage cannot make its service fully comparable to local exchange carrier 911 services. First, as an information service provider, Vonage does not enjoy the same right of interconnection to LEC 911 tandems and trunks as a telecommunications carrier would. Second, because Vonage's users access its service over the Internet, their physical location can change without notice and it is impossible for Vonage to provide the same location information to the 911 system as traditional telephone carriers do. The Commission should preempt these rules, both because they are inconsistent with Vonage's offering of an information service as described above, and because they have a particular impact on customers who use Vonage service during interstate travel.

Finally, preemption is necessary because of the impossibility of separating the Internet, or any service offered over it, into intrastate and interstate components. This ground for preemption exists *regardless* of whether Vonage's service is considered an information service or a telecommunications service under Federal law, so the Commission need not resolve that question at this time. Vonage's service is inherently portable, because customers can use it anywhere they can attach their computer equipment to a broadband Internet connection. There is no reliable

technical means of consistently determining the actual physical location of Internet users, so it is impossible for Vonage to determine the jurisdictional nature of any particular communication on a real-time basis. Indeed, Vonage knows of customers who use its service while traveling. It has identified some customers with Minnesota billing addresses who use non-Minnesota telephone numbers, and some with Minnesota telephone numbers whose addresses are in other states. These facts mean that any practical effort to comply with Minnesota's regulatory system would necessarily be inexact, and undoubtedly would require blocking of at least some interstate traffic, which is beyond Minnesota's authority to dictate. The Commission should therefore preempt the Minnesota order to prevent interference with interstate uses of the telecommunications network.

In the Matter of
VONAGE HOLDINGS
CORPORATION

Petition for Declaratory Ruling
Concerning an Order of the Minnesota
Public Utilities Commission

Vonage Holdings Corporation (“Vonage”), by its undersigned counsel, hereby petitions the Commission pursuant to 47 CFR § 1.2 to issue a Declaratory Ruling finding that an Order of the Minnesota Public Utilities Commission (“PUC”) requiring Vonage to comply with State laws governing providers of telephone service is preempted because Vonage is a provider of information services (and not a telecommunications carrier or a common carrier subject to Title II of the Communications Act of 1934) and State regulation of these services unavoidably would conflict with the national policy of promoting unregulated competition in the Internet and information services market, as recognized in 47 USC § 230(b)(2). The Commission should also find that certain specific E911 requirements imposed by the Minnesota PUC, as described in Section III below, are in conflict with Federal policies. In the alternative, the Commission can grant this Complaint without determining whether Vonage’s service constitutes an information service, because the nature of the Internet makes it inherently impossible to separate this service (regardless of its regulatory classification) into distinct interstate and intrastate components.

Vonage provides a form of Voice Over Internet Protocol (“VoIP”) service, enabling customers with broadband Internet connections and specialized Customer Premises Equipment (“CPE”) to communicate without using a telephone line. Vonage’s service permits intercommu-

nication between the incompatible protocols used on the Internet and on the Public Switched Telephone Network ("PSTN").

The Minnesota PUC recently ruled that Vonage is offering a "telephone service" under that State's laws, and therefore is required to obtain state certification, file tariffs, and comply with other State requirements for intrastate telecommunications carriers. As explained below, however, the very nature of the Internet makes it impossible to separate the interstate and intrastate components of Vonage's service (regardless of whether that service is an "information" or "telecommunications" service – a matter that the Commission need not resolve in order to issue the relief sought herein). The service can be used anywhere in the world where a broadband Internet connection is available, and because of the nature of the Internet, it is technically impossible for Vonage to determine where in the world its users are located, let alone determine whether they are communicating with others within state boundaries. Because this service is offered over the Internet, compliance with state regulation would unavoidably conflict with Federal regulation of interstate services.

Further, Vonage's service performs a net protocol conversion, and therefore is an information service under Commission precedents. The Minnesota PUC's Order imposing common carrier-type regulation on this service is in conflict with 47 USC § 230 and this Commission's past rulings concerning information services. The PUC not only failed to give any weight to these national policies, it expressly declined to consider them. Instead, it focused solely on whether Vonage's service qualifies as a "telephone service" under state law. Its one-page analysis of the state law question focused solely on whether Vonage's service is the "functional equivalent" of any other telephone service. The PUC's "duck is a duck" analysis cannot survive even the most minimal scrutiny; even if an Internet application walks like a duck and quacks like a duck, the very fact that it is offered over the Internet gives it scales like a reptile. Permitting states to use such a functional analysis also threatens to lead the industry down the slippery slope

of State regulation of all forms of two-way communications, including e-mail, instant messaging, and other as yet undreamed of forms of communication, regardless of federal policy.

Vonage stresses, initially, the very narrow nature of the relief sought in this Petition. Vonage is seeking a declaratory ruling only concerning state common carrier regulation of the specific service it offers to users of broadband Internet access, in accordance with the Commission's finding in 1998 that the regulatory classification of Internet Protocol (IP) telephony services must be based on a "complete record focused on individual service offerings."¹ At least two other petitions seeking declaratory rulings regarding VoIP services are pending before the Commission.² In each of those cases, the service provider operates in a significantly different manner than Vonage. Without offering any opinion as to the appropriate disposition of either of those petitions, Vonage emphasizes that the Commission's ruling on any one of the three services should not be viewed as a precedent for either of the others, due to the very different nature of the services involved.³

Further, this Petition is not intended to overlap with, or otherwise impact, issues concerning Voice Over IP services being considered by the Commission in other pending proceedings, including its intercarrier compensation,⁴ wireline broadband,⁵ universal service,⁶ and 911⁷

¹ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶ 90 (1998) ("*Universal Service Report*")

² See *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC-02-361 (filed Oct. 18, 2002); *Petition for Declaratory Ruling that pulver com's Free World Dialup is neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45 (filed Feb. 5, 2003).

³ The relief sought in this Petition is without prejudice to other grounds that Vonage may assert in state or federal courts for relief from the Minnesota PUC Order; however, prompt action by the Commission to issue the declaratory ruling sought herein may render issues raised in other forums moot.

⁴ See *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (¶ 5), 9616 (¶ 12), 9621 (¶ 24), and 9629 (¶ 52) (2001).

⁵ See generally *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Broadband NPRM*").

⁶ See generally *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, 17 FCC Rcd 3752 (2002). Vonage notes that, as a user of interstate telecommunications services, it bears

dockets. This Petition does not seek Commission intervention on any of these issues, but only raises the specific issue of State regulatory requirements (including regulation of entry and rates, among other things) imposed on a service (which, although the Commission need not reach this issue, Vonage believes is an information service) offered on an interstate basis over the Internet.

I. FACTUAL BACKGROUND

A. Vonage's DigitalVoice Service

Vonage's DigitalVoice™ service is an innovative Internet offering that, like e-mail, instant messaging, Internet conferencing, and other as yet undreamed of services, permits customers to communicate over the Internet. Although it resembles traditional telephone service in some respects, it has crucial technical and functional differences.

First, unlike some other services that rely on Internet Protocol transmission, Vonage customers *cannot* access DigitalVoice service by "dialing in" over the PSTN. Vonage customers can *only* access the service over a high-speed Internet connection provided by a third party telecommunications carrier, satellite or cable company.⁸ Because the Vonage service is accessed over the Internet, it can be used anywhere a broadband Internet connection is available. Thus Vonage's customers may use their service in any State, or virtually anywhere in the world so long as they have access to a broadband Internet connection.⁹ Further, the physical location of

a share of the cost of the universal service contributions assessed on the carriers from which it purchases service.

⁷ See *Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Further Notice of Proposed Rulemaking, 17 FCC Rcd 25576, 25614 ¶ 113 (2002). One of the claims asserted in the Minnesota PUC Order was that Vonage had failed to collect 911 fees from its end users. However, as a customer of Minnesota local exchange carriers, Vonage itself has been assessed and has paid 911 fees since it began operating in that State.

⁸ Vonage service will also function with any future broadband transport technologies that may be introduced, such as broadband over power lines, as long as the new service provides a connection to the Internet and complies with standard Internet protocols.

⁹ In a recent article in *PC Magazine*, one Vonage customer describes how he used Vonage's service with a California telephone number while staying at a hotel in New York City. John C. Dvorak, "Free Phone Calls," *PC Magazine* vol. 22, no. 14 at 57 (August 19, 2003) (copy attached as Exhibit 1).

users on the Internet cannot be accurately determined, as a technical matter, so it is impossible for Vonage for identify the point of origin or termination of traffic on its network.

Second, Vonage's service requires customers to purchase special CPE, namely, a computer. Vonage customers must subscribe to a broadband Internet access service, and then install compatible computer equipment that encodes audio signals as digital packets (or vice versa) and transmits and receives those packets over an Ethernet connection.¹⁰ Most Vonage customers use a specialized computer called a Multimedia Terminal Adapter ("MTA"), which contains a digital signal processing unit that performs digital-to-audio and audio-to-digital conversions, and has a standard telephone jack connection. Although a customer can connect conventional analog telephone sets to the MTA computer for use with Vonage's service, a conventional telephone will not work with Vonage's service unless it is connected to computer hardware or software that generates digital packets. Other Vonage customers do not use any traditional telephone CPE. Some use "native IP phones," which include both a telephone handset and a digital signal processing unit in an integrated device—such a device can *only* be used with an Internet connection, as it is not compatible with the PSTN. Still other users may not use any telephone handsets at all, but configure their personal computer equipment so that the microphone and speakers attached to the computer are used as the audio input and output, using a software application on the computer to perform the digital-to-analog conversion. Vonage is also testing the compatibility of its service with Personal Digital Assistant (PDA) devices and WiFi-enabled phones. In short, Vonage's network processes IP packets, regardless of what devices are used to encode or decode the audio content contained in those packets.¹¹

¹⁰ In order to use Vonage's service through a DSL connection, a router is required. As a practical matter, most cable modem users probably also use routers, so that they can attach other devices (such as a personal computer) to the modem.

¹¹ The Internet data packets that transmit Vonage "calls" are indistinguishable from any other Internet transmission. Packets conforming to the Internet Protocol specification are sent and received by a variety of computer applications, including Web browsers, e-mail client software, and instant messaging applications. The ISPs routing the packets do not interact in any way with the contents of individual packets; indeed, they do not know what form of information may be represented by the digital bits of a particular packet. A packet's contents may represent text (as in an e-mail), numeric data, graphics (as in a

Once the Vonage customer has installed and configured their computer equipment and the requisite software, the customer can place and receive “calls” to anyone with a telephone number (including other Vonage customers) by establishing a connection over the Internet to a Vonage server. A typical Vonage user’s equipment configuration is represented in the figure below:

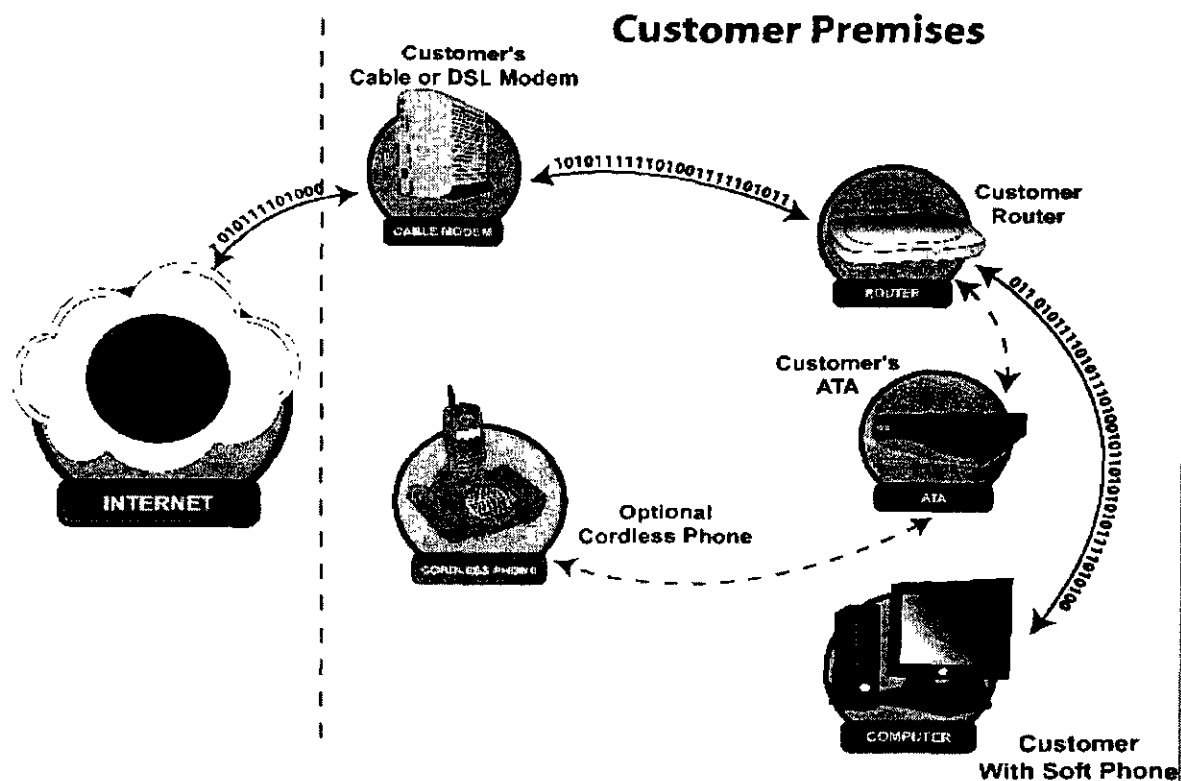


Figure I: Typical Vonage Configuration¹²

Third, Vonage performs a net protocol conversion from IP to TDM on Vonage to PSTN communications and from TDM to IP on PSTN to Vonage communications. This conversion permits users of broadband Internet connections to communicate with users of the PSTN. Vonage users can initiate and receive communications to and from PSTN users. Vonage's

GIF or .JPG file), computer programs, video, or audio signals (as in a .MP3 file or in a Vonage transmission).

¹² See http://www.vonage.com/learn_howitworks.php (visited August 28, 2003). The “ATA” in the diagram references a particular brand name for an MTA computer device.

service uses computerized media gateways that provide an interface between the Internet and the PSTN, including protocol conversion between the incompatible digital formats used by these two networks;¹³ and computer servers that process set-up signaling and route packetized data between the media gateways and other points on the Internet. Vonage does not provide either Internet access or telecommunications services. Rather, the distinguishing characteristic of the Vonage service is the conversion of data to permit communication between users of the Internet and users of the PSTN.

Packets sent by the customer's MTA or other computer are routed over the public Internet to Vonage's servers outside the state of Minnesota. There, if the communication is destined to a station on the PSTN, Vonage converts the information received in the IP packets to a TDM digital signal, and obtains a connection to the PSTN station using the services of an unaffiliated common carrier. If, however, the transmission is to be connected to another Vonage user, then it is not converted to a TDM signal, and instead the Vonage server routes a new set of IP packets to the second user. Vonage-to-Vonage "calls" never travel over the PSTN, and thus constitute purely "computer-to-computer" communications as discussed by the Commission in its *Universal Service Report*.

Fourth, Vonage is an end user of telecommunications services. Vonage purchases local telephone service from carriers in 93 metropolitan areas in 32 states nationwide to enable access to its network from the PSTN, and also purchases service from interexchange carriers for termination of traffic from its network to the PSTN. When Vonage purchases local exchange service, it is assigned telephone numbers (like any other end-user), which it uses in providing information service to its customers. Because Vonage customers may receive calls from users on the PSTN,

¹³ Modern telephone networks rarely use analog transmission except on all or part of the local loop connection between a "plain old telephone service" user and the central office. Typically, the user's communication is converted into a synchronous digital format ("Time Division Multiplexed" or TDM) at the switch line port, or at an intermediate digital loop carrier terminal. All intermediate switching and routing of the communication ordinarily occurs in the TDM digital format. Thus, Vonage does not perform any digital-to-analog conversions in its network, but only converts between asynchronous IP packets and TDM.

Vonage associates each of its customers with one or more telephone numbers. The telephone number associated with the Vonage customer is not tied to the customer's physical location. Rather, the telephone number is mapped to the digital signal processor contained in the customer's computer, enabling Vonage to identify and serve that customer over any Internet connection.

Although Vonage can not independently determine the physical location of its customers, Vonage currently has approximately 500 customers with Minnesota billing addresses. Thirty-seven of those customers do not use a Minnesota telephone number with their Vonage service, and one other customer uses a non-Minnesota number as their primary line for outgoing traffic (but has an additional Minnesota number for incoming traffic). In addition, 88 Vonage customers with billing addresses located outside of Minnesota utilize numbers with Minnesota area codes.

B. Vonage's 911 Dialing Service

As an information service provider, Vonage is under no affirmative legal obligation to provide its customers with access to the 911 services offered by telecommunications carriers. Nonetheless, in the interests of public safety, Vonage has voluntarily undertaken to develop methods of allowing its customers to contact public safety answering points by dialing the familiar digits "911".

Because of its method of operation, Vonage has not been able to offer the same forms of 911 access offered by telecommunications carriers. First, like mobile carriers, Vonage is not able for technical reasons to identify the actual geographic location of its customers at the time they place a "call." As explained in the previous section, a Vonage customer can access the service at any location where a broadband Internet connection is available, simply by plugging their MTA computer into a router or other Ethernet port. Therefore, Vonage requires its customers to register their location (through a web page) before they can use 911 dialing, and routes calls to the PSAP serving the customer's registered location. If a customer travels to a different location and forgets to update their registration, their 911 call may be routed to the wrong PSAP.

Vonage customers are notified at the time they sign up for service that they must activate 911 dialing, and receive an e-mail confirming that the feature has been activated after Vonage has received and processed the customer's address information. Vonage encourages all its customers to activate 911 dialing and does not charge any fees for providing this service to its customers.

Second, because Vonage is an information service provider, not a telecommunications carrier, it has not been able to route traffic directly to the E911 trunks operated by incumbent local exchange carriers ("LECs"). Section 251(c)(1) of the Act requires incumbent LECs to provide interconnection to these trunks to other telecommunications carriers, but not to information service providers.¹⁴ To date, Vonage has been unable to interconnect to E911 trunks in the absence of a specific legal duty that requires the incumbent LECs to offer such interconnection. (Vonage has, however, been working to obtain indirect access to the E911 network through competitive LECs, and is continuing these efforts to improve its 911 dialing service.) Accordingly, Vonage has adopted a stop-gap system (essentially enabling a speed-dial mechanism) that routes calls over conventional PSTN lines to the administrative telephone numbers of the PSAPs. Vonage understands that other 911 emergency calls, including Telecommunications Relay Service ("TRS"), telematics, and some mobile carrier calls, are also routed to the PSAPs' administrative numbers. Vonage's website clearly informs customers about the operation and limitations of its 911 dialing feature.

C. The Minnesota PUC Proceeding and Order

In December, 2002, shortly after Vonage began advertising the availability of Minnesota telephone numbers, the Minnesota Department of Commerce ("DOC") began an investigation of Vonage's activities in that State. Over a period of approximately seven months, the Department of Commerce asked Vonage to respond to four sets of written information requests, containing in

¹⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15738-15750, ¶¶ 478-500 (1996), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

total 20 separate requests (some with multiple subparts). Vonage responded to 19 of these requests, and provided the Department with a variety of requested documents, many of which were confidential and proprietary.

On July 15, 2003, the DOC filed a complaint (the "Complaint") against Vonage before the Minnesota Public Utilities Commission ("PUC"), alleging that Vonage was providing telephone service in Minnesota without the authorization required therefor under State law. A copy of the public version of the Complaint is attached as Exhibit 2. In the Complaint, the DOC requested "interim relief" in the form of an order directing Vonage to stop soliciting new customers and to file a 911 emergency services plan in advance of a hearing on the merits of the Complaint. Vonage filed an opposition to the request for interim relief on July 22, 2003, a copy of which is attached as Exhibit 3.

On July 24, 2003, the PUC voted to deny the DOC's request for temporary relief, and issued its Order Denying Temporary Relief on August 1, 2003.¹⁵ Among other things, the PUC found that it was "unable to conclude, based on the present record, that the DOC is likely to succeed on the merits of its claim, that temporary relief is necessary to protect the public's interest ... or that the relief sought is technically feasible." *Order Denying Temporary Relief at* 4. Indeed, the PUC admitted that it was "unable and unwilling to make any conclusions regarding [its] jurisdiction" over Vonage's service—*e.g.*, whether Vonage offers a telecommunications service potentially subject to regulation or an Internet information service—"without further record development." *Id.* Finally, although the PUC's Order Denying Temporary Relief expressed concern regarding Vonage's 911 offering, the PUC recognized that Vonage's service did not constitute an imminent threat to public safety, and was persuaded by Vonage's representations that it would work with the state's public safety officials to develop an acceptable 911 service *Id.*

¹⁵ See *Complaint by the Department of Commerce Against Vonage Holdings Corporation*, Order Denying Temporary Relief, DN P-6214/C-03-108 (Aug. 1, 2003). A copy of the August 1 Order is attached hereto as Exhibit 4.

Subsequently, Vonage answered and moved to dismiss the complaint. At a hearing scheduled by the Commission on August 13, 2003, to determine how to proceed with the case, the Commission deliberated the question whether Vonage provides "telephone service" within the meaning of Minnesota law. Reversing its previous decision, the PUC decided that the record was now sufficient to permit it to rule on the merits without a hearing. The PUC declined to consider whether Vonage is properly treated as an information service provider under Federal law, but concluded that Vonage does provide "telephone service" as defined in Minnesota law. As a "telephone company," Vonage would be prohibited from offering service in Minnesota until it receives a certificate of authority from the PUC (which in turn requires approval of a 911 service plan) and filed tariffs for its services with the PUC.¹⁶ The PUC ordered that Vonage must "comply with Minnesota Statutes and Rules, including certification requirements and the provisioning of 911 services."¹⁷

II. THE STATE OF MINNESOTA IS PREEMPTED FROM IMPOSING COMMON CARRIER REGULATION ON INTERNET INFORMATION SERVICES

The Minnesota PUC Order regulates Vonage as a common carrier, or as a "telephone company" under the terms of Minnesota law. It requires Vonage to obtain state certification as a condition of offering its service; to file tariffs containing generally applicable rates, terms, and conditions of service; and to comply with E911 requirements applicable to common carriers. For the reasons explained below, the Commission should declare that Minnesota is preempted from imposing common carrier regulation (including regulation of entry and rates) on the information service offered by Vonage.

¹⁶ *Complaint of the Minnesota Department of Commerce against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance at 2 (Minn. PUC Sept. 11, 2003) ("September 11 Order"), citing Minn. Stats. §§ 237.07, 237.16 subd. 1(b), 237.74 subd. 12, and Minn. Rules part 7812.0200, subp. 1 and part 7812.0550, subp. 1. A copy of the September 11 Order is attached hereto as Exhibit 5.

¹⁷ September 11 Order at 8.

A. Vonage Offers an Information Service, and Is Not Subject To Regulation As a “Common Carrier” or a “Telecommunications Carrier” Under Title II

The service offered by Vonage as an application for users of the Internet is properly classified as an enhanced service under the Commission’s *Computer II* test (and, therefore, an “information service” under the definitions enacted in the Telecommunications Act of 1996). The Minnesota PUC mistakenly treated Vonage’s service as a “basic” service, subject to regulation as a common carrier, or as a “telecommunications service” under the 1996 Act definition. As the statutory definitions make clear, Vonage offers an information service because it “processes” and “transforms” the information transmitted by its users.¹⁸ Like other information services, Vonage’s service is provided “via telecommunications,” and depends on the telecommunications capabilities offered by other providers (both regulated and unregulated).

In the *Second Computer Inquiry*,¹⁹ this Commission defined unregulated “enhanced services” as “services, offered over common carrier transmission facilities used in interstate communications, which [1] employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; [2] provide the subscriber additional, different or restructured information; or [3] involve subscriber interaction with stored information.” 47 C.F.R. § 64.702(a). Vonage’s service qualifies as “enhanced” under the first subpart of this test, by changing the form of the information as sent and received by the user. Vonage’s service converts the asynchronous IP packets generated by the customer’s computer equipment into the synchronous TDM format used by the telephone network (and vice

¹⁸ “The term telecommunications means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received ” 47 U.S.C. § 153(43). A “telecommunications service” is “the offering of telecommunications for a fee directly to the public....” 47 U.S.C. § 153(46). Likewise, a telecommunications carrier “means any provider of telecommunications services....” 47 U.S.C. § 153(44). “The term information service means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications....” 47 U.S.C. § 153(20).

¹⁹ *Second Computer Inquiry*, Final Decision, 77 FCC 2d 384 (1980) (“*Computer II*”), modified on recon., 84 FCC 2d 50 (1980), further modified on recon., 88 FCC 2d 512 (1981), *aff’d sub nom. Computer and Communications Indus. Ass’n v FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

versa). As such, Vonage's provision of VoIP service "employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information." 47 C.F.R. § 64.702(a). Vonage's service provides an interface between the otherwise incompatible network protocols of the Internet and the PSTN. This Commission has specifically held that such protocol conversion, so long it constitutes a *net* protocol conversion, is a principal hallmark of an information service.²⁰ The net conversion test examines the service on an end-to-end basis from the demarcation point at the premises of the originating caller to the demarcation point where the call will be terminated. Vonage's VoIP service does not originate and terminate in the same format and therefore satisfies the net protocol conversion test, therefore qualifying it as an information service.²¹

Like any information service, of course, Vonage's VoIP service *uses* telecommunications to deliver information to its users, but Vonage does not *provide* telecommunications. In the *Universal Service Report*, the Commission stated that "carrier regulation" should be "limit[ed] ... to those companies that provide the underlying transport."²² Vonage uses the telecommunications capabilities of the underlying cable modem and DSL providers and of the common carriers from which it purchases services to connect its users to the PSTN.

Vonage, in short, provides an *application* over the Internet that is fundamentally inseparable from the enhanced nature of Internet access itself. Vonage users use the same Internet access connection for transmission of voice data as they do for browsing the Web, downloading MP3 files, sending and retrieving e-mail, and exchanging instant text messages. That connection

²⁰ Services that result in no net protocol conversion to the end user continue to be classified as basic services. *Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Memorandum Opinion, Order, and Statement of Principles, 95 FCC 2d 584, 596 (1983) ("*Communications Protocols Decision*").

²¹ Although Vonage expresses no opinion as to the appropriate regulatory classification of any other service, it must be stressed that Vonage's service is factually very different from so-called "phone-to-phone" voice over IP services whose customers place a conventional telephone call over the PSTN to access a gateway where their conversation is converted into IP format. Vonage's service relies upon a native IP connection to the demarcation point at the customer premises.

²² *Universal Service Report* at ¶ 95.

cannot be “enhanced” for some packets and “basic” for others. As the Commission cautioned, “it would be incorrect to conclude that Internet access providers offer subscribers separate services ... that should be deemed to have separate legal status, so that, for example, we might deem electronic mail to be a ‘telecommunications service,’ and Web hosting to be an ‘information service.’”²³ Rather,

[t]he service that Internet access providers offer to members of the public is Internet access. That service gives users a variety of advanced capabilities. Users can exploit those capabilities through applications they install on their own computers. The Internet service provider often will not know which applications a user has installed or is using. Subscribers are able to run those applications, nonetheless, precisely because of the enhanced functionality that Internet access service gives them.²⁴

²³ *Universal Service Report* at ¶ 79.

²⁴ *Id.* This determination is in accord with the finding in *Computer II* that basic and enhanced services could be similar:

We acknowledge, of course, the existence of a communications component. And we recognize that some enhanced services may *do some of the same things* that regulated communications services did in the past. On the other side, however, is the substantial data processing component in all these services.

Computer II at ¶ 435 (emphasis added). And the Commission reiterated these findings in its recent orders finding that cable modem service and (tentatively) the DSL internet access service offered by LECs are information services. For example, with respect to cable modem service, the Commission stated that:

Cable modem service is not itself and does not include an offering of telecommunications service to subscribers. We disagree with commenters that urge us to find a telecommunications service inherent in the provision of cable modem service. Consistent with the statutory definition of information service, cable modem service provides the capabilities described above “via telecommunications.” That telecommunications component is not, however, separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.

Cable Modem Declaratory Order, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4823 ¶ 39 (2002). See also *Appropriate Framework For Broadband Access To The Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3032 (2002) (stating that the Commission has tentatively concluded that “nothing about the nature of wireline broadband Internet access services offered over a provider’s own facilities changes the fact that the end-user service is an information service.”).

The Commission's description of "applications" that end users "install on their own computers" to "exploit" the advanced "capabilities" of Internet access services describes Vonage's service exactly. Vonage does not provide the Internet connection and is not an ISP itself. The "host" ISP whose customers access Vonage through its facilities is no more aware of that fact than of any other web browsing its customers may do.

Finally, the Commission expressly considered Vonage's service configuration in its *Universal Service Report* (¶ 87), and found that computer-originated IP telephony, such as that offered by Vonage, "does not appear to be providing telecommunications services to its subscribers." As a consequence, services such as Vonage's must be classified as information services for regulatory purposes.

In the *Universal Service Report*, the Commission analyzed two different kinds of IP telephony, one characterized as "phone-to-phone IP telephony," the other as "computer-to-computer IP telephony." While recognizing that different service configurations were possible, the Commission found that "phone-to-phone IP telephony" is characterized by calls originated over a "handset connected to the public switched network" that is terminated "to ... [an] ordinary telephone at the receiving end."²⁵ Although such phone-to-phone calls may be routed over an IP network – even over the public Internet – the Commission said they "lack[] the characteristics that would render them 'information services' within the meaning of the statute."²⁶ Because "phone-to-phone IP telephony" calls are both originated and terminated on the PSTN, in the same TDM protocol used on the PSTN, the Commission found that no *net* protocol conversion takes place.

The Commission contrasted phone-to-phone applications with "computer-to-computer IP telephony," which it characterized as follows.

²⁵ *Universal Service Report* at ¶ 84.

²⁶ *Universal Service Report* at ¶ 89.

In the case of “computer-to-computer” IP telephony, individuals use software and hardware at their premises to place calls between two computers connected to the Internet. The IP telephony software is an application that the subscriber runs, using Internet access provided by its Internet service provider. The Internet service providers over whose networks the information passes may not even be aware that particular customers are using IP telephony software, because IP packets carrying voice communications are indistinguishable from other types of packets. As a general matter, Title II requirements apply only to the “provi[sion]” or “offering” of telecommunications. Without regard to whether “telecommunications” is taking place in the transmission of computer-to-computer IP telephony, the Internet service provider does not appear to be “provid[ing]” telecommunications to its subscribers.

Id., ¶ 87.

As noted previously, some of Vonage’s customers place computer-to-computer “calls,” and thus fall explicitly within the above analysis. Moreover, the fact that many Vonage transmissions have one end on the PSTN does not change the analysis. During a Vonage computer-to-phone “call,” the underlying protocol of the transmission is changed from the IP packets generated by the Vonage home computer to the TDM format of the PSTN on which the “call” is terminated. Thus, Vonage’s computer-to-phone application involves a net protocol conversion and clearly qualifies as an information service.

The Commission summarized its analysis by crafting a four-part test for determining when IP telephony services should be classified as telecommunications services, rather than information services. Telecommunications services, it found, are characterized by the following: (1) the provider holds itself out as providing voice telephony or facsimile transmission service; (2) the provider does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) the provider allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) the provider transmits customer information without net change in form or content.²⁷

²⁷ *Universal Service Report* at ¶ 88.

Although Vonage's service satisfies the first and third of these criteria (Vonage customers use the service as an alternative to placing conventional telephone calls, and can place "calls" to ordinary telephone numbers), it unequivocally does *not* satisfy the other two elements. Consumers must install special CPE (*i.e.*, computer equipment) that is incompatible with the PSTN, and the transmission *does* involve a net protocol conversion – from the IP format of the Internet to the TDM format of the PSTN. The Minnesota PUC simply overlooked, or mischaracterized, these aspects of Vonage's service.

Thus, there is no basis in fact or law to classify Vonage's service as a telecommunications service. Vonage, clearly, provides an information service. As such, it is not subject to common carrier regulation. *See, e.g.*, 47 C.F.R. § 64.702(a) ("Enhanced services are not regulated under Title II of the Act"). Indeed, noting the competitiveness of the information services industry, and the benefits that accrue to U.S. consumers as a consequence, the Commission has attempted to impose as few regulatory obligations on information services as possible.²⁸

The Commission should therefore declare that, as a matter of Federal law, Vonage is providing an "information service" and is neither a "telecommunications carrier" nor a "common carrier" for purposes of Title II of the Communications Act of 1934.

B. State Regulation of Internet Applications is Inconsistent with Federal Law

The Commission's power to preempt State laws and regulations that conflict or interfere with Federal laws and policies is well-established. As the Commission recently observed, "The Supremacy Clause of the Constitution empowers Congress to preempt state or local laws or regulations under certain specified conditions."²⁹ Further, the Commission stated "that "[p]re-

²⁸ *See Computer II*, 77 F.C.C.2d 384 at ¶ 432 ("to subject enhanced services to a common carrier scheme of regulation .. would negate the dynamics of ... this area").

²⁹ *Federal-State Joint Board on Universal Service, Western Wireless Corporation (Petition for Preemption of an Order of the South Dakota Public Utilities Commission)*, Declaratory Ruling, 15 FCC Rcd. 15168, ¶ 8 (2000), citing *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986) ("*Louisiana*").

emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulations.”³⁰

The Supreme Court’s decision in *Louisiana* summarized the conditions under which preemption is appropriate:

Preemption occurs [1] when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, [2] when there is outright or actual conflict between federal and state law, [3] where compliance with both federal and state law is in effect physically impossible, [4] where there is implicit in federal law a barrier to state regulation, [5] where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or [6] where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.³¹

The second, third, and sixth *Louisiana* conditions exist here, in that there is actual conflict between federal and state law, compliance with both sets of law is effectively impossible, and state law is an obstacle to the federal objective of leaving interstate Internet services unfettered by state regulation.

As described above, this Commission has maintained a consistent policy for more than two decades of encouraging the development of information services free from traditional common carrier regulation. In the name of applying State policy, the Minnesota PUC Order directly contradicts this federal policy. Common carrier status, under both state and federal law, imposes “broad standards of conduct, requiring the provision of service upon reasonable request, pursuant to charges and practices which are just and reasonable and not unjustly discriminatory.”³² The Commission found that imposition of these requirements on information service

³⁰ *Id.*, citing *Louisiana* at 369; *Fidelity Federal Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (“[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulation or frustrates the purposes thereof”).

³¹ *Louisiana* at 368-369 (citations omitted)

³² *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 15 (1998).

providers is both unnecessary and counter-productive: “[i]n fact, the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network.”³³ Yet the Minnesota PUC Order imposes on Vonage these same counter-productive common carrier requirements.

The Telecommunications Act of 1996 both reinforced and expanded this Commission’s long-standing policy of deregulating enhanced services. The Act codified the dichotomy between basic and enhanced services, using the terms “telecommunications service” and “information service” instead.³⁴ Further, Congress found that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.” 47 USC § 230(a)(4). In order “to promote th[is] continued development,” the 1996 Act reaffirmed the “policy of the United States” to “preserve the vibrant and competitive free market ... for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 USC § 230(b)(2). Again, the Minnesota PUC Order ignores this federal directive on the basis that state policy requires the functional equivalent of traditional telephone service to be regulated the same as traditional telephone service.

As an information service, the Internet is exempt from common carriage regulation.³⁵ This is so even though “there may be telecommunications services that can be provisioned through the Internet.”³⁶ The Commission found that Congress has directed it to continue

³³ *Computer II* at ¶ 7; see also ¶¶ 127-129 (“In our judgment, regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market. Regulation also would disserve the interest of consumers and the goals of the Communications Act.”)

³⁴ The Commission has determined that these statutory definitions are mutually exclusive and parallel the definitions of “basic service” and “enhanced service” developed in *Computer II*. *Universal Service Report* at ¶ 39.

³⁵ See *Universal Service Report* at ¶ 73 (finding that because Internet access providers “combine computer processing, information provision, and other computer-mediated offerings with data transport, Internet access services are appropriately classified as information, rather than telecommunications, services.”), see also *Cable Modem Declaratory Ruling*, 17 FCC Rcd. at 4822, ¶ 38 (finding that cable modem service is an information services); *Broadband NPRM*, 17 FCC Rcd at 3027-3035, ¶¶ 13-29.

³⁶ *Universal Service Report* at ¶ 101.

"[l]imiting carrier regulation to those companies that provide the underlying transport," with the goal of "ensur[ing] that regulation is minimized and is targeted to markets where full competition has not emerged."³⁷ The Commission inferred this mandate directly from the text of the 1996 Act: "Congress, by distinguishing 'telecommunications service' from 'information service,' and by stating a policy goal of preventing the Internet from being fettered by state or federal regulation, endorsed this general approach."³⁸

Recognizing that State regulations could conflict with these federal policies aimed at protecting information services from unnecessary and potentially burdensome regulation, the Commission has significantly limited the scope of the states' regulatory authority in this area. In *Computer II*, it found "that the enhanced services under consideration in this proceeding ... fall within the subject matter jurisdiction of this Commission,"³⁹ and expressly preempted State "common carrier tariff regulation" of a carrier's provision of enhanced services.⁴⁰ The U.S. Court of Appeals for the D.C. Circuit upheld this exercise of preemptive authority, explaining that "[f]or the federal program of deregulation to work, state regulation of CPE and enhanced services ha[ve] to be circumscribed."⁴¹

Subsequent orders have recognized that state regulation of information services, if not preempted, would interfere with federal policies.⁴² Although the Commission's policy is that

³⁷ *Universal Service Report* at ¶ 95.

³⁸ *Id.*

³⁹ *Computer II* at ¶ 125

⁴⁰ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Further Order on Reconsideration, 88 FCC 2d 512, ¶ 83 n.34 (1981) ("*Computer II Further Reconsideration Order*").

⁴¹ *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982).

⁴² See *Computer III Remand Proceedings Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-263, Report and Order, 6 FCC Rcd. 7571, 7631 (1991) ("*Computer III Remand*"), *aff'd*, *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994) (finding that in the Commission's order preempting state regulation of information services, the Commission had met its burden of showing that its "regulatory goals ... would be negated" by conflicting state regulation).

preemption should be narrowly tailored to specific State actions that are likely to interfere with the Federal scheme, the Commission has stated expressly that it may extend its preemptive authority “on a case-by-case basis” as needed to prevent State regulations from encroaching on Federal policies.⁴³ In fact, the Commission has recognized the harm that would result if information service providers were classified as telecommunications carriers: such a classification “could encourage states to impose common-carrier regulation on such providers.”⁴⁴ Thus, actions such as Minnesota’s are exactly what this Commission sought to avoid when it classified Internet services, such as Vonage’s, as information services.

The Minnesota PUC not only ignored this conflict between its policies and Federal law, it refused to even consider federal policy. Rather, the Minnesota PUC focused solely on whether Vonage’s service qualifies as a “telephone service” under state law. And its one-page analysis of the state law question focused solely on whether Vonage’s service is the “functional equivalent” of any other telephone service. Although the Minnesota PUC interpreted *state* law referring to “telephone” service as applying only to voice services, its refusal to consider Federal laws and policies, if not preempted, would allow another State to enforce a law regulating intrastate transmission of information in text form, in video form, or in any other form. It therefore threatens to lead the industry down the slippery slope of state PUC regulation of all forms of two-way communications, including e-mail, instant messaging, and other as yet undreamed of forms of communication, regardless of federal policy.

The Minnesota PUC’s “analysis” of the facts before it was basically limited to finding that Vonage offers a service that “is functionally the same as any other telephone service.” September 11 Order at 8. Since the PUC did not hold a hearing or permit the filing of any testimony, it could not have performed any more substantial factual analysis. But this “a duck is a duck” analysis does not withstand even slight scrutiny. The Vonage service has important

⁴³ *Computer III Remand* at 7631, para. 121.

⁴⁴ *Universal Service Report*, ¶ 48.

technical differences from conventional telephone service, including the provision of a net protocol conversion. And these technical differences result in a very significant functional difference to the customer – they access the service using a computer over the Internet, not over a telephone line. If Minnesota’s analysis were permitted to stand, many other Internet applications could become subject to regulation. For example, this Commission historically regulated Telex service, which is a now-obsolete service permitting two users at teletype terminals to communicate through text messages. Instant messaging services offered over the Internet provide “functionally the same” services as Telex, over a different medium; and electronic mail is just another version of telegraph service. Under Minnesota’s theory, any state could disregard the technical differences and regulate instant messaging, electronic mail, or virtually any other Internet application (including computer-to-computer VoIP service, which the Commission has expressly classified as an information service) as an intrastate “telecommunications” service.

Even assuming *arguendo* that Vonage’s service has a separately identifiable “purely intrastate” component when offered over the Internet (which, as discussed in Section IV below, it does not), State imposition of common carrier regulation on that service would be inconsistent with the express Congressional policy that the Internet should be free from *Federal and State* regulation, and with this Commission’s findings that the public interest will be best served by innovation and unfettered competition in the offering of information services. In the *Computer II* proceeding, the Commission expressly found that “the provision of enhanced services is not a common carrier public utility offering and that *efficient utilization and full exploitation* of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation.”⁴⁵ “States, therefore, may not impose common carrier tariff regulation on a carrier’s provision of enhanced services.”⁴⁶

⁴⁵ 77 FCC 2d at 428-29.

⁴⁶ *Computer II Further Reconsideration Order* at ¶ 83 n.34.

Here, it cannot be disputed that State regulation of individual services offered over the Internet has the potential to prevent “efficient utilization and full exploitation of the interstate telecommunications network” over which Internet traffic passes. If Vonage is prohibited from offering DigitalVoice service in Minnesota, Internet access customers in Minnesota will not be able to use the same wide range of Internet applications available to their counterparts in other states. This will affect their usage of, and subscription to, Internet access itself, which the Commission has already found to be an inherently interstate information service.⁴⁷ If one State decides to regulate instant messaging, and another regulates e-mail, the Internet as a whole will become less valuable to customers in other States (and countries) because they will no longer be able to exchange data in any desired format with any other user. Therefore, the Commission should find that State regulation of services offered over the Internet *necessarily* interferes with interstate use of the Internet and with the Federal policy of promoting such use.

Preemption is also appropriate to assure regulatory parity among companies that provide exactly the same service over exactly the same facilities in exactly the same manner. There is no question that the PUC would be precluded from imposing carrier regulation on a statutory “cable company.”⁴⁸ Though the *Portland* and *Henrico* courts employed different reasoning, and the Commission applied yet a different taxonomy in its *Cable Modem Declaratory Ruling*, the fact remains that all three orders preclude the imposition of telephone regulation on cable modem service, including any application-level services offered by the cable modem provider. Thus, if a cable operator provided a voice service to its customers over a cable modem connection using

⁴⁷ *Broadband NPRM*, 17 FCC Rcd at 3027-3035, ¶¶ 13-29; *Universal Service Report* at ¶¶ 33, 39, 56-82; *Amendment of Section 64.702 of the Commission's Rules and Regulation, Tentative Decision and Further Notice of Inquiry and Rulemaking*, 72 FCC 2d 358, 389-90 (1979), 77 FCC 2d 384 (1980) (Final Decision), *recon.*, 84 FCC 2d 50 (1980) (Reconsideration Order), *further recon.*, 88 FCC 2d 512 (1981) (Further Reconsideration Order), *aff'd sub nom Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

⁴⁸ See *City of Portland v AT&T*, 216 F.3d 871, 877-79 (9th Cir. 2000) (holding that local authority's attempt to regulate telecommunications services of cable operator was preempted by federal law); *MediaOne Group, Inc v County of Henrico, Virginia*, 257 F.3d 356, 362-65 (4th Cir. 2001) (holding that federal law preempts local authorities from imposing telecommunications obligations on cable franchise).